Supreme Court, U.S.
FILED

SEP 17 2003

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No. 03 439

In The

Supreme Court of the United States

Jonathan L. Haas,
Petitioner,
v.
United States Department of Veterans' Affairs,
Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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In propria persona
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37 pp

Petitioner Jonathan L. Haas, in *propria persona*, an unnamed member of the plaintiff class in this certified class action, respectfully requests that the Court grant the Petition for Writ of Certiorari, seeking review of the decision by the United States Court of Appeals for the Ninth Circuit. [Appendix A]

QUESTIONS PRESENTED FOR REVIEW

1. Did the Court of Appeals deny Petitioner his constitutional due process rights under the Fifth Amendment to the Constitution, and under 28 U.S.C. §§ 1654, 1291 and 1292(a) by denying jurisdiction of petitioner's appeal of the Order of the United States District Court for the Northern District of California?

2. Did the Court of Appeals for the Ninth Circuit enter a decision in conflict with the decisions of the First, Fifth, Seventh and Tenth Circuit Courts of Appeals on the important issues of (1) referring Petitioner's claim to the class counsel rather than dismissing the claim, and (2) not allowing hybird representation in Rule 23(b)(2) class actions?

3. Did the Court of Appeals for the Ninth Circuit so far depart from the accepted and usual course of judicial proceedings, and sanction such a departure by a lower court, as to call for an exercise of this Court's supervisory power?

PARTIES TO THE PROCEEDINGS

Beverly Nehmer, Claude Washington, Linda Wagenmakers, Robert Fazio, George Claxton, Julio Gonzales, P[illegible] Ray Jensen, William Madden, David Maier, Bruce Miller, Richard Frahm and the Vietnam Veterans,

Plaintiffs,

v.

United States Veterans' Administration, The Veterans' Advisory Committee on Environmental Hazards, and the Administrator of Veterans' Affairs,

Defendants.

Jonathan L. Haas,

Member of the Plaintiff Class,

v.

United States Veterans' Administration,

Defendant.

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2. The Court of Appeals for the Ninth Circuit entered a decision in conflict with the decisions of the First, Fifth, Seventh and Tenth Circuit Courts of Appeals on the important issues of (1) referring Petitioner's claim to the class counsel rather than dismissing the claim, and (2) not allowing hybird representation in Rule 23(b)(2) class

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3. The Court of Appeals for the Ninth Circuit has so far departed from the accepted and usual course of judicial proceedings and has sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power. 10

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JURISDICTION

The date on which the United States Court of Appeals decided this case was June 16, 2003. [Appendix A]

A timely motion for reconsideration was denied by the United States Court of Appeals on August 6, 2003. [Appendix E]

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE AND FACTS

This petition arises out of Nehmer v. Department of Veterans' Affairs, No. C86-6160 (N. D. Cal.), a long-running certified class action suit. It was settled pursuant to a 1991 consent decree (Final Stipulation and Order) subject to the continuing jurisdiction of the district court. [Appendix C] The action involves veterans' entitlement to disability, medical and death benefits resulting from their exposure to herbicides containing dioxin, principally "Agent Orange," during the Vietnam War. [Veterans' Dioxin and Radiation Exposure Compensation Standards Act of 1984, 38 U.S.C. 316, renumbered 38 U.S.C. 1116] See Nehmer v. United States Veterans' Administration, 118 F.R.D. 113 (1987); Nehmer v. United States Veterans' Administration, 712 F.Supp. 1404 (1989); Nehmer v. United States Veterans'Administration, 32 F.Supp.2d 1175 (1999) and Nehmer v. United States Veterans' Administration, 284 F.3d 1158 (9th Cir.2002).

Respondent conceded in its Motion to Dismiss

Appeal for Lack of Jurisdiction in the Appeals' Court that Petitioner is a member of the plaintiff class. [As set forth in the District Court record, Petitioner was exposed to Agent Orange while serving on a United States Naval ship in the coastal waters of Vietnam (Petitioner received four awards of the Vietnam Service Medal). As set forth in the District Court record, he suffers from serious disabling diseases: type 2 diabetes, peripheral neuropathy, neuropathy and retinopathy.]

On November 9, 2000, the Acting Secretary, Department of Veterans' Affairs [VA], announced the determination there is a positive association between Type 2 diabetes and the herbicides used in Vietnam. Veterans affected are those honorably discharged who served in the Republic of Vietnam during the period January 9, 1962, through May 7, 1975, and have adult onset diabetes mellitus, now known as Type 2 diabetes. A final regulatory amendment to 38 CFR 3.309(e), adding Type 2 diabetes to VA's list of diseases for which VA allows presumptive service connection based on herbicide exposure, was published in the Federal Register pages 23166-23169, on May 9, 2001. The effective date of this regulation was July 9, 2001.

Plaintiff, meeting the requirements of 38 U.S.C. 1116(a)(3) and 38 C.F.R. 3.307(a)(6)(iii), filed a service connected disability claim with the Phoenix, Arizona, office of the VA on July 27, 2001.[1] Plaintiff's claim was

---

[1] All claims filed in 2003 and earlier come within the scope of the Stipulation and Order. Nehmer v. United States Veterans' Administration, 284 F.3d 1158, 1162, FN3

denied on May 8, 2002. A Decision Review Officer again denied the claim on December 5, 2002. The claim is now on appeal to the Board of Veterans' Appeals.

> . . . [A] veteran who, during active military, naval, or air service in the Republic of Vietnam during the period beginning on January 9, 1962, and ending on May 7, 1975, and has a disease referred to in paragraph (1)(B) of this subsection shall be presumed to have been exposed during such service to an herbicide agent containing dioxin 2,4-dichlorophenoxyacetic acid, and may be presumed to have been exposed during such service to any other chemical compound in an herbicide agent, unless there is affirmative evidence to establish that the veteran was not exposed to any such agent during service.

38 U.S.C. 1116(a)(3)

> Service in the Republic of Vietnam includes service in the waters offshore and service in other locations if the conditions of service involved duty or visitation in the Republic of Vietnam.

38 CFR 3.307(a)(6)(iii)

(9th Cir.2002).

In July, 2001, pursuant to the Final Stipulation and Order, paragraph 3, in the matter *sub judice* [Appendix C], Petitioner filed a motion *pro se* in the United States District Court for the Northern District of California to show cause why Respondent should not be held in contempt for failing to comply with the Final Stipulation and Order [Appendix C] and provide benefits, including medical care, to Petitioner, a veteran, who was exposed to Agent Orange while serving in the Republic of Vietnam in the United States Navy. The District Court denied the motion on April 24, 2003. [Appendix B]

Petitioner appealed the District Court's Order and filed a Motion to Proceed in Forma Pauperis. The Court of Appeals for the Ninth Circuit dismissed the appeal on June 16, 2003:

> A review of the record demonstrates that this court lacks jurisdiction over this appeal because the order challenged in the appeal is not final or appealable. See U.S.C. § 1291; Chacon v. Babcock, 640 F.2d 221 (9th Cir.1981) (order is not appealable unless it disposes of all claims as to all parties). Consequently, this appeal is dismissed for lack of jurisdiction.
>
> Appellant's request to proceed in forma pauperis is denied as moot.

[9th Circuit Order, Appendix A]

Petitioner filed a motion with the District Court to

have Rule 54(b) language of finality included in its Order and was informed that "final judgment was entered in this case many years ago."

Petitioner filed a Motion for Reconsideration in the Court of Appeals [Appendix D], which was denied on August 6, 2003. [Appendix E]

REASONS WHY THE WRIT SHOULD BE GRANTED

1. Petitioner, a member of the plaintiff class as of July 9, 2001, has a due process right under the Fifth Amentments to the Constitution, and under 28 U.S.C. §§ 1654, 1291 and 1292(a) to relief and his day in court.

Petitioner Haas attempted to obtain representation by class counsels in the District Court, but to no avail. Petitioner's district court motion stated:

> Plaintiff attempted to obtain representation by the attorneys that represented the plaintiffs in the original action [Nehmer v. United States Veterans' Administration, 118 F.R.D. 113 (1987) and Nehmer v. United States Veterans' Administration, 712 F.Supp. 1404 (1989)]. Linda S. Peterson was not willing to represent new members of the plaintiff class and plaintiff was unable to locate Barton F. Stichman.

Petitioner had a statutory right to appear personally in this matter.

> In all courts of the United States the parties may plead and conduct their own cases personally or by counsel as by the rules of such courts, respectfully, are permitted to manage and conduct causes therein.

28 U.S.C. § 1654.

Respondents may argue that Petitioner must file a motion with the district court for permission to intervene. If class counsel is not available to represent Petitioner in the matter *sub judice* they will not be available to represent Petitioner in a motion to intervene. Likewise, if Petitioner cannot represent himself in the matter *sub judice*, how can he represent himself in a motion to intervene? Also, intervention is not always a prerequisite for an unnamed class member to have standing to appeal. Powers v. Eichen, 229 F.3d 1249, 1256 (9th Cir. 2000). Plaintiff is a member of the plaintiff class. He has met the conditions set by the district court to qualify him as a member of the class. Respondent acknowledged that he is a member of the plaintiff class. Petitioner could intervene as of right. American Pipe and Construction Co. v. Utah, 444 U.S. 538, 544 and n.8, 94 S.Ct. 756, 38 L.Ed.2d 713 (1974).

The Appeals Court is mistaken that it lacks jurisdiction over Petitioner's appeal.

Pursuant to 28 U.S.C. § 1291, the Appeals' Court

has jurisdiction "of appeals from all final decisions of the district courts of the United States." Respondent concedes that Petitioner is a member of the plaintiff class. Class counsel is well-aware of these proceedings involving Petitioner's claims. Petitioner requested class counsel to represent him and was refused representation. Petitioner informed class counsel that he was a member of the class and of their continuing duty to represent class members; however, class counsel refused to represent Petitioner. Petitioner has exhausted all reasonable attempts at obtaining their representation. Having no alternative, Petitioner filed the action in *propria persona*. Petitioner informed the district court in his pleadings of his dilemma and that class counsel had refused to represent him. Rather than ordering class counsel to represent Petitioner, a member of the class, or at least conducting a hearing in that regard, the District Court, citing no rule or law, ordered Petitioner's motion for an order to show cause dismissed.

Pursuant to 28 U.S.C. § 1292(a)(3), the Appeals' Court has jurisdiction of appeals from "[i]nterlocutory decrees of such district courts or the judges thereof determining the rights and liabilities of the parties to admiralty cases in which appeals from final decrees are allowed." This matter involves a determination of whether service in a United States Naval vessel in the coastal waters of the Republic of Vietnam constitutes "service in Vietnam." Admiralty jurisdiction, in pertinent part, includes all cases of injury to persons caused by a vessel on navigable waters, not withstanding that such injury commenced on land. [46 U.S.C. § 740] The Court

of Appeals had jurisdiction under this statute as well.

Petitioner has an administrative appeal pending before the Board of Veterans' Appeals. However, the district court has ruled that class members were not required to exhaust administrative remedies where there was an adequate record for judicial review, the agency had taken a final position on issues raised in lawsuit, and class members were likely to suffer irreparable harm if not granted prompt judicial review. Nehmer v. United States Veterans' Administration, 118 F.R.D. 113, 124 (1987) Petitioner filed his claim for service connected disability on July 27, 2001. Relief is nowhere in sight. Petitioner may well not live long enough to obtain review in this Court via the Veterans' Court of Appeals. The United States Government should not be allowed to escape answering for poisoning Petitioner by delaying justice until Petitioner has died as a result of that poisoning.

2. The Court of Appeals for the Ninth Circuit entered a decision in conflict with the decisions of the First, Fifth, Seventh and Tenth Circuit Courts of Appeals on the important issues of (1) referring Petitioner's claim to the class counsel rather than dismissing the claim, and (2) not allowing hybird representation in Rule 23(b)(2) class actions.

The District Court dismissed Petitioner's motion out of hand because he was not represented by class counsel. [Appendix B] The Appeals' Court upheld this handling of the situation. [Appendix A] Other circuits disapprove of such conduct and require that the class

member's motion be referred to class counsel. See Jordan v. Jones, 563 F.2d 148 (5th Cir.1977).

By denying jurisdiction and allowing the District Court order of dismissal to stand, the Appeals' Court violated Petitioner's due process right that the court stringently apply the competent representation requirement because class members are bound by the judgment (unless they optout),even though they may not actually be aware of the proceedings. See Albertson's Inc. v. Amalgamated Sugar Co., 503 F.2d 459, 463-64 (10th Cir.1974) The First, Seventh and Tenth circuits allow pro se representation by class members. See 28 U.S.C. § 1654; Herrera-Venegas v. Sanchez-Rivera, 681 F.2d 41, 42 (1st Cir.1982); United States v. Taylor, 569 F.2d 448 (7th Cir.1978), cert. denied, 435 U.S. 952, 98 S.Ct. 1581, 55 L.Ed.2d 803 (1978). United States v.Grismore, 546 F.2d 844 (10th Cir.1976). The Ninth Circuit did not.

The Seventh Circuit has held that this right of self-representation is a Constitutional right. United States v. Taylor, 569 F.2d 448, 452 (7th Cir.1978), citing Faretta v. California, 422 U.S. 806, 95 S.Ct.525, 45 L.Ed.2d 562 (1975).

The Fifth and Eleventh Circuits allow hybird representation in Rule 23(b)(2) class actions where class members seek individual monetary relief, in additional to class-wide injunctive or declaratory relief. See Penson v. Terminal Transp. Co., 634 F.2d 989, 994 (5th Cir. Unit B 1981); Cox v. American Cast Iron Pipe Co., 741 F.2d 1332 (11th Cir.1984), cert. denied, 479 U.S. 883, 107 S.Ct. 274, 93 L.Ed.2d 250 (1986). The Ninth Circuit did not.

3. The Court of Appeals for the Ninth Circuit has so far departed from the accepted and usual course of judicial proceedings, and has sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power.

The Court of Appeals has effectively dealt a death-knell to Petitioner's (and others similarly situated) right to enforce the Final Stipulation and Order, which adjudicated Petitioner's rights as an unnamed member of the plaintiff class. Class counsel refused to represent new members of the class who were added to the class under recent additions to 38 U.S.C. § 1116 and the Ninth Circuit is wrong in not permitting appeal of adverse District Court determinations affecting the rights of individual unnamed class members. By failing to enforce Rule 23(a) the Court of Appeals has abrogated its duty to ensure adequate representation of unnamed class members. Other in the class actions *sub judice* will also be bound by the class decision but will not receive adequate representation.

Petitioner's Motion to Show Cause in the District Court was, in effect, a motion to intervene. Denial of such motions are appealable. Marino v. Ortiz, 484 U.S. 301, 304, 108 S.Ct. 586, 588, 98 L.Ed.2d 629 (1988). Failure of the Court of Appeals to accept jurisdiction was contrary to this Court's holding in Marino, supra..

The enforcement of public law is required to safeguard private interests. The power to safeguard these rights should not be left to the public authorities nor put in the keeping of the district courts. Their desire to limit further litigation should not be allowed to overshadow

private rights. Missouri-Kansas Pipe Line Co. v. United States, 312 U.S. 502, 61 S.Ct. 666, 85 L.Ed. 975 (1941) The Court of Appeals abrogated its duty to enforce the laws of the United States.

CONCLUSION

Petitioner has a Sixth Amendment constitutional due process right to his day in court. He has a statutory right to represent himself under 28 U.S.C. § 1654. The Appeals' Court has jurisdiction to enforce such statutory right. Petitioner is a member of the plaintiff class. The Appeals Court has jurisdiction under 28 U.S.C. § 1291 and 28 U.S.C. § 1292(a) as set forth above.

Other Naval veterans of the Vietnam War, similarly situated, having served aboard Naval ships in the coastal waters of Vietnam, will likewise be denied their medical and financial benefits authorized by Congress, unless these issues are addressed by the Court.

[The VA holds that the following legal opinion precluded granting Petitioner's disability claim.

> A September 13, 1996 VA General Counsel memorandum offers the following opinion and it is based on this opinion current policy dictates actually having set foot on to Vietnam as opposed to serving in the waters offshore. The provision in question, as it originally appeared in former 38 CFR 3.311a(a)(1) (1986), included a comma after the word "locations". This punctuation, which serves to separate the subsequent t[illegible]n from those immediately preceding the comma, suggests that the phrase, "if the conditions of service involved duty or visitation in the Republic of Vietnam" is not tied exclusively to the immediately

preceding phrase, but, rather, refers to both "service in the waters offshore", and "service in other locations". In addition, the preamble to the Federal Register notice proposing issuance of section 3.311a(a)(1) appears to support this interpretation, stating, "[b]ecause some military personnel stationed elsewhere may have been present in the Republic of Vietnam, service in the Republic of Vietnam, will encompass services elsewhere if the person concerned actually was in the Republic of Vietnam, however briefly. 50 Fed. Reg., 15,848, 15,849 (1985). Moreover, since application of herbicides would not have occurred in waters off the shore of Vietnam, limiting the scope of the term "[s]ervice in the Republic of Vietnam" to persons whose service involved duty or visitation in the Republic of Vietnam would focus the coverage of the regulations on persons who may have been in areas where herbicides could have been encountered.

When title 38 of the Code of Federal Regulations was amended in 1994 to delete former 38 CFR 3.311(a) and incorporate certain provisions of that regulation into section 3.307, the comma following "locations" was dropped from the provision in question. However, the Federal Register notices proposing and adopting that change gave no suggestion that a change in the meaning of the provision was intended. See 58 Fed. Reg. 450,528, 50,529 (1993); 59 Fed. Reg. 5106 (1994). Thus, we believe that the phrase "[s]ervice in the Republic of Vietnam", as used in section 3.307(a)(6)(iii) does not include veterans who served aboard ships off the coast of Vietnam but whose service did not involve duty or visitation in the Republic of Vietnam.

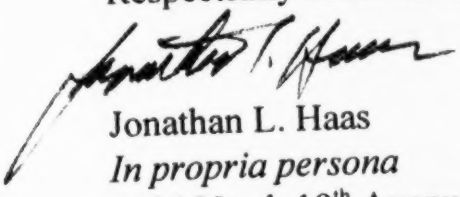
The VA has taken a final position on this issue:

Until such time as we hear otherwise, the

General Counsel September 1996 opinion to the effect service in Vietnam actually means having set foot on shore is still for application and service connection for diabetes and its manifestations must therefore be denied. Since herbicide exposure is not automatically presumed for veterans who served off shore, the veteran needs to furnish evidence he was actually exposed to Agent Orange in service.]

The petition for a writ of certiorari should be granted.

Respectfully submitted,



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September 17, 2003

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

Filed
Jun 16, 2003

JONATHAN L. HAAS, Plaintiff - Appellant, v. U.S. VETERANS ADMINISTRATION, Defendant - Appellee.	No. 03-15876 D.C. No. CV-86-06160-THE Northern District of California San Francisco **ORDER**

Before: RYMER, THOMAS and SILVERMAN, Circuit Judges

A review of the record demonstrates that this court lacks jurisdiction over this appeal because the order challenged in the appeal is not final or appealable. *See* 28 U.S.C. § 1291; *Chacon v. Babcock*, 640 F.2d 221 (9th Cir. 1981)(order is not appealable unless it disposes of all claims as to all parties). Consequently, this appeal is dismissed for lack of jurisdiction.

Appellant's request to proceed in Forma pauperis is denied as moot.

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

Filed
Apr. 24, 2003

BEVERLY NEHMER, et al.,

Plaintiff,

v.

UNITED STATES VETERANS ADMINISTRATION, et al.,

Defendants.

No. C86-6160 THE

CLASS ACTION

ORDER

The Court is in receipt of a *pro se* motion by Jonathan L. Haas "to show cause [contempt]," filed April 4, 2003. Mr. Haas is a member of the certified class in this action and is represented by class counsel. Accordingly , any motion in this case must be made through class counsel. Class members can not file motions *pro se*(i.e. representing themselves) seeking substantive relief.

Accordingly, and good cause appearing, Mr. Haas' motion to show cause is denied.

B

IT IS SO ORDERED.

DATED 4/24/03

s/ Thelton E. Henderson
THELTON E. HENDERSON
UNITED STATES
DISTRICT JUDGE

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

BEVERLY NEHMER, et al., Plaintiffs, v. UNITED STATES VETERANS ADMINISTRATION, et al., Defendants.	Civil Action No. CV-86-6160(THE) FINAL STIPULATION AND ORDER

Plaintiffs filed an Emergency Motion for Enforcement and Supplementation of Prior Orders. As

a result of subsequent discussions of the matters raised by plaintiff' motion, plaintiffs and defendants, through their undersigned counsel, hereby stipulate as follows:

1. The Veterans' Advisory Committee on Environmental Hazards, ("Advisory Committee" or "Committee") created pursuant to the Veterans' Dioxin and Radiation Exposure Compensation Standards Act of 1984, 38 U.S.C. § 354 note, Sect. 6, will complete its analysis as to whether the scientific or medical evidence reveals a connection between exposure to dioxin and diabetes, lung cancer and peripheral neuropathy (hereafter referred to as the "three diseases") at or shortly after its May 23-24, 1991meeting and convey its evaluation and any recommendations to the Secretary forthwith.

2. The Secretary will review the Committee's report and all other relevant scientific or medical evidence he determines appropriate and, in each of the three diseases, make one of the following determinations: (a) to initiate rulemaking to service connect the disease through the issuance of a proposed positive rule and a final rule as appropriate following public comment on the proposed rule; (b) to initiate rulemaking to issue a negative proposed rule, i.e., rejecting service connection (based on a finding of a lack of evidence establishing a significant statistical association between the disease and exposure to dioxin) and a final rule as appropriate following public comment on the proposed rule; or (c) defer issuing any rule (for example, but not limited to, circumstances where there is a decision that there is insufficient current information). The Secretary's determination for each of

the three identified diseases will be made and communicated to the Court and plaintiffs no later than July 1, 1991.

3. As soon as a final rule is issued service connecting, based on dioxin exposure, any of the three diseases, soft tissue sarcoma, and any other diseases which may be service connected in the future pursuant to the Agent Orange Act of 1991, 38 U.S.C. § 316(b), the VA shall promptly thereafter readjudicate all claims for any such disease which were voided by the Court's Order of May 3, 1989, as well as adjudicate all similar claims filed subsequent to the Court's May 3, 1989 Order, without waiting for final rules to be issued on any other diseases.

4. Prior to conducting the adjudications referred to in paragraph 3, above, VA will provide individual notice to each claimant denied benefits under the previous regulation (as identified from the Special Issue Rating System ("SIRS") or as a result of a VA finding based on information brought to its attention by a claimant or claimant's representative, that, although the individual is not on SIRS, he or she had a claim denied that was voided by the Court's Order) that the claims will be readjudicated with all of the procedural rights normally applicable to such VA proceedings. The notice will inform the claimant: that the claim is in the process of being readjudicated; that the claimant will be afforded a reasonable and specified time within which to present evidence or reasons why the claim is meritorious under the new regulation, and that if the claimant does not present such evidence or reasons, VA will readjudicate the claim on the basis of the previous

adjudicatory record alone; and that VA will provide notice of the final result. The VA shall conduct all adjudications referred to in paragraph 3 above, in accordance with all the terms of the notice specified in this paragraph.

5. For any of the three diseases for which the Secretary determines to issue a final positive rule, as well as soft tissue sarcoma, as to which the Secretary has issued a proposed rule providing service connection in certain circumstances, and any other disease which may be service connected in the future pursuant to paragraph 3 above, as to any details of claims which were voided as a result of the Court's May 3, 1989 Order, the effective date for disability compensation or dependency and indemnity compensation ("DIC") if the claim is allowed upon readjudication pursuant to paragraphs 3 and 4 above, will be the date the claim giving rise to the voided decision was filed (except as otherwise provided in 38 U.S.C. §§ 3010(b)(1) or 3010(d)(1)), assuming the basis upon which compensation is granted after readjudication is the same basis upon which the original claim was filed, or the date the claimant became disabled or death occurred, whichever is later. In the event the basis upon which a claim for compensation benefits is granted after readjudication is different than the basis for the original claim giving rise to the voided decision, the effective date for beginning disability compensation or DIC will be the date on which the claim asserting the basis upon which the claim is granted was filed, or the date the claimant became disabled or death occurred, whichever is later. For any claim for any such disease which was not filed until

after May 3, 1989, the effective date for beginning disability compensation or DIC will be the date the claim was filed or the date the claimant became disabled or death occurred, whichever is later.

6. For any of the three diseases for which the Secretary determines, pursuant to paragraph 2(c) above, not to issue any rule, and for all other diseases for which the Secretary has not already issued a proposed or final rule, the Agent Orange claims of plaintiff class will not be denied at least until the Secretary acts on the first report from the National Academy of Sciences, or another entity in its stead, pursuant to Section 2 of the Agent Orange Act of 1991, Pub. L. 1024, amending 38 U.S.C. §316(c). The claims for any of the identified diseases may be denied only if the Secretary makes a determination for such disease, in accordance with 38 U.S.C. § 316(c), as amended, to the effect that there is no positive association for such disease.

7. Through 10. not included.

* * *

Respectfully submitted,

s/ Theodore C. Hirt
Theodore C. Hirt

s/ Gershon M. Ratner
Gershon M. Ratner

s/ Charles W. Sorenson, Jr.
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Attorneys for Plaintiffs and their Class

May 14, 1991

May 14, 1991

It is so ORDERED this____Day of May, 1991:

s/ Thelton E. Henderson
Thelton E. Henderson
United States District Judge

Jonathan L. Haas
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Plaintiff (in *propria persona*)

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

Beverly Nehmer, et al.,	)	
	)	No. 03-15876
Plaintiffs,	)	
	)	**PLAINTIFF-**
and Jonathan L. Haas,	)	**APPELLANT HAAS'**
	)	**MOTION FOR**
Plaintiff-Appellant,	)	**RECONSIDERATION**
	)	
v.	)	
	)	
United States Department	)	
of Veterans Affairs, et al.,	)	
	)	
Defendants-Appellees.	)	
	)	

Plaintiff-Appellant Jonathan L. Haas, in *propria persona*, a member of the plaintiff class in the above-

named case, pursuant to FRAP Rule 27(b), moves the Court to reconsider its Order filed June 16, 2003, dismissing this appeal for lack of jurisdiction, as further set forth in the following Memorandum.

Dated this 23rd day of June, 2003.

s/ Jonathan L. Haas
Jonathan L. Haas, in *propria persona*
2534 North 19th Avenue
Phoenix, Arizona 85009
Member of the Plaintiff Class

Jonathan Haas certifies that:

An original plus four copies of this motion
was mailed by first-class mail, postage prepaid,
this 23rd day of June, 2003, to:

Clerk, U. S. Court of Appeals for the Ninth Circuit
P. O. Box 193939
San Francisco, CA 94119-3939

One copy of this response was mailed by
first-class mail, postage prepaid,
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By: s/ J. L. Haas

MEMORANDUM

Background.

Appellant Haas filed a Notice of Appeal in this matter, mailed on April 28, 2003. Appellee filed a Motion to Dismiss Appeal For Lack of Jurisdiction, mailed on June 9, 2003, received by Appellee on June 12, 2003. Appellant filed a Response to Motion to Dismiss For Lack of Jurisdiction, mailed on June 14, 2003. This Court filed its Order dismissing the appeal on June 16, 2003.

Argument.

Appellant Haas, pursuant to FRCP Rule 27(a)(3), has a right to file a response to appellees' motion to dismiss. The response was filed well-within the time limits set forth in FRAP Rule 27(a)(3)(A). It is apparent that the Court did not consider appellee's response prior to ruling on the motion to dismiss.

In its Order the Court cites as authority 28 U.S.C. § 1291 and Chacon v. Babcock, 640 F.2d 221 (9th Cir. 1981). Neither authority sets an absolute rule; Chacon cites "special circumstances" as exceptions to the general rule.[1]

Appellant set forth in his Response to Motion to Dismiss Appeal for Lack of Jurisdiction the following "special circumstances:" (1) appellant has been abandoned by class counsel; (2) appellant has a statutory right to represent himself [28 U.S.C. § 1654]; (3) this case is an admiralty matter [28 U.S.C. § 1292(a)(3), 46 U.S.C. § 740]; (4) intervention is not a prerequisite for standing to appeal [Powers v. Eichen, 229 F.3d 1249, 1256 (9th Cir. 2000)]; and (5) 5th, 6th and 14th Amendments constitutional right to his day in court.

Appellant also invites the Court's attention to the following "special circumstances" which are applicable to this case.

---

[1] It is very difficult to inform the Court of the special circumstances if the Court will not wait to read appellant's responsive pleading which is timely filed.

> We have also recognized, however, a narrow class of collateral orders which do not meet this definition of finality, but which are nevertheless immediately appealable under § 1291 because they . . . conclusively determine [a] disputed question . . . that is completely separate from the merits of the action . . . effectively unreviewable on appeal from a final judgment. (citations omitted)

Quackenbush v. Allstate Insurance Company, 517 U.S. 706, 711, 116 S.Ct. 1712, 1718, 135 L.Ed.2d 1 (1996)

> Moreover, unless such orders [issued pursuant to district court's continuing jurisdiction] are found final, there is often little prospect that further proceedings will occur to make them final. (citations omitted)

U.S. v. State of Washington, 761 F.2d 1404, 1406 (9th Cir.1985)

> It is sometimes appropriate to give the finality requirement a practical rather than a technical construction. (citations omitted)

State of Washington, Id., at 1406

The Orders of this Court and the District Court

effectively put appellant out of court. Class counsel refused to represent appellant as a member of the class.

Dated this 23rd day of June, 2003.

s/ Jonathan L. Haas
Jonathan L. Haas, in *propria persona*
2534 North 19th Avenue
Phoenix, Arizona 85009
Member of the Plaintiff Class

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

Filed
Aug. 6, 2003

JONATHAN L. HAAS,

Plaintiff - Appellant,

v.

U.S. VETERANS ADMINISTRATION,

Defendant - Appellee.

No. 03-15876

D.C. No. CV-86-06160-THE
Northern District of California
San Francisco

ORDER

Before: RYMER, THOMAS and SILVERMAN, Circuit Judges

Appellant's motion for reconsideration of this court's June 16, 2003 order dismissing this appeal for lack of jurisdiction is denied.

No further motions for reconsideration, rehearing, modification, clarification, stay of mandate or any other submission shall be filed or entertained in this closed docket.

E

(2)

Supreme Court, U.S.
FILED
NOV 24 2003
OFFICE OF THE CLERK

No. 03-439

In the Supreme Court of the United States

JONATHAN L. HAAS, PETITIONER

v.

DEPARTMENT OF VETERANS AFFAIRS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals properly dismissed petitioner's appeal of the district court's order denying his pro se motion seeking certain individualized relief in connection with this class action, which petitioner filed without securing the assistance of class counsel who represents him or seeking to intervene.

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In the Supreme Court of the United States

No. 03-439

JONATHAN L. HAAS, PETITIONER

v.

DEPARTMENT OF VETERANS AFFAIRS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The order of the court of appeals (Pet. App. A) dismissing petitioner's appeal for lack of jurisdiction is unreported. The order of the district court (Pet. App. B) is unreported.

JURISDICTION

The order of the court of appeals dismissing petitioner's appeal for lack of jurisdiction was entered on June 16, 2003. Petitioner's motion for reconsideration of that order was denied on August 6, 2003 (Pet. App. E). The petition for a writ of certiorari was filed on September 24, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. This petition arises out of a long-running, nationwide class action brought on behalf of Vietnam War veterans seeking disability and death benefits for exposure to Agent Orange during the Vietnam War. See *Nehmer* v. *Department of Veterans Affairs*, 284 F.3d 1158 (9th Cir. 2002); *Nehmer* v. *United States Veterans' Admin.*, 32 F. Supp. 2d 1175 (N.D. Cal. 1999); *Nehmer* v. *United States Veterans' Admin.*, 118 F.R.D. 113 (N.D. Cal. 1987). In 1987, the plaintiff class was certified pursuant to Rule 23(b)(2) of the Federal Rules of Civil Procedure with no opt-out provision for unnamed members of the class. *Nehmer*, 118 F.R.D. at 115. Petitioner, a decorated veteran who served in the Vietnam War, is an unnamed member of the certified class. Pet. App. B.

In 1991, the class action was settled pursuant to a consent decree (Pet. App. C) that is subject to the ongoing jurisdiction of the district court for enforcement purposes. *Nehmer*, 284 F.3d at 1160. Generally speaking, under the consent decree, the United States Department of Veterans Affairs (VA) was required to promulgate new rules identifying diseases that have been shown to be associated with exposure to Agent Orange during the Vietnam War, applying a more lenient standard of proof of association than the one that the VA had initially applied in developing its rules. *Nehmer*, 32 F. Supp. 2d at 1176-1177. In addition, the VA is responsible for adjudicating the claims brought by individual class members (or their survivors) seeking benefits for allegedly service-connected diseases identified by the VA's Agent Orange regulations. *Id.* at 1177.

2. The VA's current regulations identify 11 diseases, including type 2 diabetes, which are presumed to have been incurred in or aggravated by service during the Vietnam War "[i]f [the] veteran was exposed to an herbicide agent during active military, naval, or air service." 38 C.F.R. 3.309(e); see also 68 Fed. Reg. 59,540 (2003). For purposes of this presumption of service connection, a veteran who "served in the Republic of Vietnam during the period beginning on January 9, 1962, and ending on May 7, 1975," is presumed to have been exposed to such agents and, therefore, need not submit proof that he or she was exposed to herbicide agents in service. 38 U.S.C. 1116(f). The VA's regulations provide that, for purposes of the presumption of herbicide exposure, service in the Republic of Vietnam "includes service in the waters offshore and service in other locations if the conditions of service involved duty or visitation in the Republic of Vietnam." 38 C.F.R. 3.307(a)(6)(iii).

In July 2001, petitioner filed a claim with the Phoenix, Arizona office of the VA, seeking disability compensation for type 2 diabetes and related conditions, which he alleges were caused by exposure to herbicide agents during his service on a Navy ship in the coastal waters of Vietnam. Pet. 2. The regional office denied that claim in May 2002. After petitioner submitted additional evidence, the regional office again denied the claim in December 2002. Petitioner appealed the denial of his benefits claim to the Board of Veterans' Appeals. See 38 U.S.C. 7101(a), 7104(a). That appeal is currently pending before the Board.

The VA regional office concluded that petitioner was not entitled to the presumption that he was exposed to herbicides during his service in the Republic of Vietnam. See 05/08/02 Rating Decision (VA File No. 24 699

165), attached to Motion to Show Cause at App. 35-39. The regional office noted that petitioner had served on a ship in the waters off the coast of Vietnam during the Vietnam War, but found that petitioner did not actually set foot on the shore of the Republic of Vietnam. *Id.* at 38-39. The regional office also found that there was no direct evidence that he was actually exposed to herbicides during his service. *Id.* at 39. Because herbicide exposure was not established, the regional office concluded that petitioner was not entitled to the presumption of service connection for diabetes. In his pending administrative appeal, petitioner challenges the requirement in 38 C.F.R. 3.307(a)(6)(iii) that physical presence in the Republic of Vietnam is necessary to trigger the presumption of exposure to herbicides.

3. On April 4, 2003, while his administrative claim was on appeal to the Board, petitioner filed in the district court a pro se motion to show cause why the VA should not be held in contempt for failing to grant him benefits.[1] In particular, the motion (at 14) sought an order holding the VA in "civil contempt"; "granting judgment to plaintiff sufficient to cover his health care needs and living expenses for the remainder of his life"; and fining the VA "an amount to ensure future compliance with the [consent decree]." The court denied the motion, explaining that, because petitioner "is a member of the certified class in this action and is represented by class counsel," "any motions in this case must be made through class counsel." Pet. App. B.

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[1] The motion stated (at 2 n.1) that "[petitioner] attempted to obtain representation by the attorneys that represented the plaintiffs in the original action," but that "[one attorney] was not willing to present new members of the plaintiff class and [petitioner] was unable to locate [another attorney]."

4. In an unpublished order, the Ninth Circuit dismissed petitioner's appeal for lack of jurisdiction. Pet. App. A. The court of appeals stated that "[a] review of the record demonstrates that this court lacks jurisdiction over this appeal because the order challenged in the appeal is not final or appealable." *Ibid.* The court subsequently rejected petitioner's motion for reconsideration of that order. Pet. App. D.

ARGUMENT

The district court properly rejected petitioner's pro se motion to show cause where petitioner, an unnamed class member, did not secure the assistance of class counsel to bring the motion on his behalf or seek to intervene for the purpose of pursuing his individualized claim for relief on his own behalf. In addition, in those circumstances, the court of appeals properly dismissed petitioner's appeal for lack of jurisdiction. The unpublished order of the court of appeals does not conflict with any decision of this Court or of any other court of appeals. Further review is therefore not warranted.

1. Petitioner states (Pet. 6) that, pursuant to 28 U.S.C. 1654, he "had a statutory right to appear personally in this matter." Section 1654 provides that, "[i]n all courts of the United States the parties may plead and conduct their own cases personally or by counsel." *Ibid.* But Section 1654 conditions that general authorization on "the rules of such courts" governing the "manage[ment] and conduct [of] causes therein." *Ibid.*

Rule 23 of the Federal Rules of Civil Procedure, which governs class actions, permits one or more named "representative parties" to maintain an action on behalf of a class of similarly situated individuals when certain criteria are met, including the requirement that the representatives will "fairly and ade-

quately protect the interests of the class." Fed. R. Civ. P. 23(a) and (b). Moreover, the settled practice under Rule 23—which is expressly embodied in subsection (g) of the amendment to Rule 23 scheduled to take effect on December 1, 2003—is for the court to appoint class counsel who will fairly and adequately represent the interests of all members of a certified class. Class counsel represents the interests, and acts on behalf of, the class members throughout the course of the proceeding, with one principal exception. The well-established practice—reflected in subsection (e)(4) of the proposed amendments to Rule 23—is that unnamed class members may appear and object to a proposed settlement at a fairness hearing concerning that settlement.

Section 1654 does not authorize petitioner, or unnamed class members writ large, to appear individually and file individual claims in a class action on their own behalf. Indeed, such a regime would largely negate the practical advantages of the class action device, especially in a case, such as this, in which there are tens of thousands of class members. But that does not mean that unnamed class members must rely solely on the representation of counsel appointed to represent their interests. In some class actions (though not this one), unnamed class members may elect to opt out of the class. Furthermore, even when, as here, class members do not enjoy such opt-out rights, the federal rules expressly authorize class members "to intervene and present [their own] claims or defenses." Fed. R. Civ. P. 23(d)(2).[2]

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[2] In addition, Rule 23(c)(2) states that, in class actions governed by Rule 23(b)(3), "any member who does not request exclusion may, if the member desires, enter an appearance *through counsel*."

Rule 24(a)(2) of the Federal Rules of Civil Procedure permits intervention of right when a class member shows that his interests are not being adequately represented by "existing parties." Fed. R. Civ. P. 24 advisory committee note (1966 Amendment). In addition, courts may grant unnamed class members permissive intervention pursuant to Rule 24(b). In practice, it is not uncommon for individual class members to seek to intervene in certified class actions to assert individualized claims for relief. See 5 Alba Conte & Herbert Newberg, *Newberg on Class Actions* § 16:9, at 175-176 (4th ed. 2002) ("Intervention may occur for the purpose of recovery. When it appears that damages issues may not be litigated cohesively, class members may intervene to argue their damages claims individually.") (footnotes omitted).

Petitioner's pro se motion to show cause sought individualized relief. In his motion (at 14), petitioner, *inter alia*, asked the district court not only to hold the VA in contempt for not granting petitioner's disability claim, but also to "grant[] judgment to [petitioner] sufficient to cover his health care needs and living expenses for the remainder of his life." The district court denied that motion on the ground that petitioner "is repre-

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Fed. R. Civ. P. 23(c)(2) (emphasis added). There is no comparable provision governing class actions, such as this one, certified under Rule 23(b)(2), but Rule 23(d) does authorize a court to "make appropriate orders" in any class action, and that provision has been interpreted to authorize a court, in its discretion, to permit an unnamed class member to enter an appearance through his own counsel. Fed. R. Civ. P. 23(d); see 5 Alba Conte & Herbert Newberg, *Newberg on Class Actions* § 16:13, at 192-193 (4th ed. 2002). Moreover, outside of the objection-to-settlement context discussed in the text above, there is no rule that authorizes individual class members to appear and act on their own behalf without counsel.

sented by class counsel," and "any motion in this case must be made through class counsel." Pet. App. B. That ruling is correct, and it is consistent with the settled understanding that, at least outside of the settlement context in which unnamed class members are permitted to appear and object to a proposed settlement, class members generally must act through the class counsel who has been appointed by the court to represent their interests in the litigation.

Prior experience in this litigation indicates that class counsel has acted to seek relief on behalf of individual class members who have had difficulty securing disability benefits through the administrative claims process. For example, in 1998, counsel for the plaintiff class appeared for the purpose of asking the district court to enforce the consent decree on the ground that the VA was "construing one aspect of the parties' settlement agreement too narrowly," and thus had "improperly den[ied] certain class members the full extent of retroactive benefits to which they are entitled." *Nehmer*, 32 F. Supp. 2d at 1176. That dispute arose when "counsel for plaintiffs learned of the situation of two class members, Rosa Aponte and Janet George," whose claims for certain benefits had been denied by the VA. *Id.* at 1178.

To the extent that petitioner asserts that class counsel was unreasonably unwilling to assist petitioner here, see note 1, *supra*, the proper course was for petitioner to seek leave to intervene in the action to present his individualized grievance. Because petitioner neither secured the assistance of class counsel nor intervened in the action to pursue the matter in his

own right, the district court properly denied his pro se motion for individualized relief.[3]

2. Petitioner challenges (Pet. 6-7) the court of appeals' dismissal of his appeal for lack of jurisdiction. However, for largely the same reasons that the district court properly refused to entertain petitioner's pro se motion for an order to show cause, the court of appeals properly dismissed petitioner's appeal of that order pursuant to 28 U.S.C. 1291. See Pet. App. A.

As this Court recently observed in *Devlin* v. *Scardelletti*, 536 U.S. 1, 9-10 (2002), although unnamed class members are parties to a class action in the sense that they are bound by the judgment in that action, they are not necessarily parties to the action in all senses. See *id.* at 10 ("The label 'party' does not indicate an absolute characteristic, but rather a conclusion about the applicability of various procedural rules that may differ based on context."). In *Devlin*, the Court held that unnamed members of a plaintiff class may appeal a district court order approving a class action settlement, without having to intervene in the action for purposes of bringing an appeal. In so holding, however, the Court emphasized that a "longstanding practice" in class actions is to allow unnamed class members to object to a settlement at a fairness hearing, and that "the power of appeal [recognized by the Court in *Devlin*] is limited to those nonnamed class members who have objected during the fairness hearing." *Id.* at 11. As this Court itself recognized, that requirement

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[3] Petitioner argues (Pet. 10) that his motion to show cause "was, in effect, a motion to intervene." That is incorrect. The motion did not request permission to intervene, or attempt to explain why intervention was warranted under Rule 24.

"limits the class of potential appellants [in class actions] considerably." *Ibid.*[4]

This case does not arise in the procedural context addressed by *Devlin*. Petitioner is not seeking to appeal an order approving a class action settlement to which he objected. Rather, as discussed, petitioner is seeking to appeal a post-judgment order denying his motion for an order to show cause why he is not entitled to certain individualized relief. Moreover, in seeking such relief, petitioner was not permitted by rule or generally accepted class action practice to act on his own behalf, as is true of unnamed class members who object to a class action settlement at a fairness hearing. Rather, petitioner sought a type of individualized relief for which he either should have secured the assistance of class counsel or formally intervened in the action. Having failed to do either, petitioner is not a proper party to the litigation for purposes of maintaining an appeal, and the court of appeals therefore properly dismissed his appeal.

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[4] In *Devlin*, this Court emphasized that, in the class-action-settlement context, the interests of the class representative who has *agreed* to a settlement may diverge from the interests of unnamed class members who have *objected* to that settlement. See 536 U.S. at 9 ("Petitioner's right to appeal this aspect of the District Court's decision [*i.e.*, the court's decision rejecting petitioner's objections to a settlement] cannot be effectively accomplished through the named class representative—once the named parties reach a settlement that is approved over petitioner's objections, petitioner's interests by definition diverge from those of the class representative."). That is not true here. In this case, petitioner's own interests in securing disability benefits from the VA for his alleged exposure to Agent Orange do not necessarily diverge from the interests of the class representatives. And, as discussed, in this litigation class counsel has sought relief when the benefit claims of certain unnamed class members were denied by the VA.

Powers v. *Eichen*, 229 F.3d 1249 (9th Cir. 2000), relied upon by petitioner (Pet. 6), is not to the contrary. In that case, the court held "that an unnamed class member who files an objection in district court to the amount of attorneys' fees requested in a class action settlement under Rule 23 may appeal the award of such fees without intervening in the district court." 229 F.3d at 1256. In other words, *Eichen* involved a variation of the same basic issue resolved by this Court in *Devlin*—*i.e.*, "whether to allow non-intervening unnamed parties to appeal the fairness of a settlement award in a Rule 23 class action." *Id.* at 1255. The court did not consider whether an unnamed class member was entitled to appeal without attempting to intervene outside of the objection-to-proposed-settlement context, much less in the unique post-judgment circumstances here.

The other lower court decisions cited by petitioner (Pet. 8-9) are similarly inapposite and do not in any way conflict with the court of appeals' unpublished order dismissing petitioner's appeal in this case. None of those cases supports the proposition, much less holds, that an unnamed member of a certified class represented by class counsel is entitled to pursue an individualized claim for relief without either securing the services of class counsel or seeking to intervene in the action, or to appeal a district court order rejecting an attempt to do so.[5]

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[5] See *Cox* v. *American Cast Iron Pipe Co.*, 784 F.2d 1546, 1549 (11th Cir.) (holding that the district court had improperly decertified an employment discrimination class action), cert. denied, 479 U.S. 883 (1986); *Penson* v. *Terminal Transp. Co.*, 634 F.2d 989, 995 (5th Cir. 1981) (holding that a class member's post-judgment individual suit was not barred by the entry of judgment in the class action, where the notice given to class members of their opt-out rights was found to be inadequate); *Herrera-Venegas* v. *Sanchez-*

3. Petitioner errs (Pet. 7-8) in suggesting that the court of appeals had jurisdiction pursuant to 28 U.S.C. 1292(a)(3). That provision authorizes appeals of "[i]nterlocutory decrees of such district courts or the judges thereof determining the rights and liabilities of the parties to admiralty cases in which appeals from final decrees are allowed." *Ibid.* This is not an "admiralty case," and, in denying petitioner's motion to show cause, the district court did not exercise any admiralty jurisdiction.

Nor did the court of appeals have jurisdiction under 28 U.S.C. 1292(a)(1), which, *inter alia*, authorizes appeals from orders "refusing to dissolve or modify injunctions." In *Carson* v. *American Brands, Inc.*, 450 U.S. 79, 84 (1981) (citation omitted), this Court held

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Rivera, 681 F.2d 41, 42 (1st Cir. 1982) (holding that a nonlawyer prisoner could not appear as "Paralegal Counsel" in the appeal of a non-class action); *Jordan* v. *Jones*, 563 F.2d 148, 148 (5th Cir. 1977) (holding that allegations in a subsequent individual action that the class action defendants were not complying with an order in the class action required the district court either to reopen the class action and refer the new complaint to the class action counsel or to consolidate the new case with the class action); *United States* v. *Grismore*, 546 F.2d 844, 847 (10th Cir. 1976) (holding that a criminal defendant did not have a right to be represented by lay counsel of his choice); *Albertson's, Inc.* v. *Amalgamated Sugar Co.*, 503 F.2d 459, 463-464 (10th Cir. 1974) (holding that the district court properly declined to certify a class action where the named plaintiffs were competitors). Citing *United States* v. *Taylor*, 569 F.2d 448 (7th Cir.), cert. denied, 435 U.S. 952 (1978), petitioner argues (Pet. 9) that the "right of self-representation is a Constitutional right." But *Taylor*, a criminal case, merely discussed the familiar principle recognized in *Faretta* v. *California*, 422 U.S. 806, 836 (1975), that the criminally accused enjoy a "constitutional right to conduct [their] own defense." See *Taylor*, 569 F.2d at 452 (citing *Faretta*). That principle does not apply in the civil context in which this case arises.

that an interlocutory order refusing to enter a consent decree containing injunctive relief is appealable under 28 U.S.C. 1292(a)(1) as an order refusing an injunction, if the order might have a "serious, perhaps irreparable, consequence," and if the order can be "effectually challenged" only by an immediate appeal. In this case, however, petitioner did not challenge a refusal to enter or modify a consent decree. The consent decree in this case was entered a number of years ago. Rather than challenging or seeking to modify that decree, petitioner moved for an order to show cause why respondent should not be held in contempt for failing to make certain disability payments and grant him a judgment sufficient to cover certain costs.

4. The fact that petitioner has yet to exhaust his administrative remedies provides an additional basis to deny the petition for certiorari. As explained above, petitioner has challenged the VA's denial of his claim for benefits and his appeal is currently pending before the Board of Veterans' Appeals. If petitioner prevails on appeal, he may secure the disability benefits that he seeks. If he does not prevail, he may then obtain judicial review of the VA's final administrative decision in the manner prescribed by Congress. See 38 U.S.C. 7252, 7292 (authorizing appeal of decisions of the Board of Veterans' Appeals to United States Court of Appeals for Veterans Claims, and appeal of decisions of the latter court to the Court of Appeals for the Federal Circuit). The *Nehmer* class action, which involves legal issues of general application that were common to the members of the class, should not ordinarily displace the orderly procedures prescribed by Congress for the resolution of claims of individual veterans seeking relief. Moreover, given that petitioner's administrative claim is still pending on appeal, his motion for an order

to show cause why the VA should not be held in contempt for not granting such benefits was at the very least premature.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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NOVEMBER 2003

(3)

No. 03-439

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In The

Supreme Court of the United States

Jonathan L. Haas,
Petitioner,

v.

United States Department of Veterans' Affairs,
Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

REPLY TO BRIEF FOR THE RESPONDENT IN OPPOSITION

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STATEMENT OF THE CASE AND FACTS

The Department of Veterans' Affairs (VA) states, "The VA regional office concluded that petitioner was not entitled to the presumption that he was exposed to herbicides during his service in the Republic of Vietnam." [Brief in Opposition, p. 2]

The VA further states, "The regional office also found that there was no direct evidence that he was actually exposed to herbicides during his service." [Brief in Opposition, p. 4] The VA fails to reveal the rest of the story.

Petitioner, upon reading this conclusion of the hearing officer, realized that the hearing officer had failed to obtain and review the logs of the ship in which Petitioner had served, which would show the proximity to the coast the ship was operating and that the ship was engulfed in clouds of herbicides which were being sprayed over the trees on the beach. Petitioner, therefore, filed a Request for Decision Review Officer dated August 19, 2002, which stated in pertinent part that "he was exposed to agent orange being sprayed by aircraft on coastal jungles while his ship was in the coastal waters of Vietnam." [VA File No. 24 699 165], attached to Motion to Show Cause at App. 46-92 He attached a sworn affidavit describing this experience. [Id. at 90-92] [See Appendix F attached hereto] The Affidavit of Petitioner was not contradicted or opposed by credible evidence, and, therefore established that Petitioner was exposed to herbicide Agent Orange. [Doctrine of Reasonable Doubt, 38 C.F.R. Section 3.102] These decisions are contrary to

the law. [See 38 U.S.C. Section 1154(b)]

The evidence established that Petitioner was actually exposed to agent orange and was entitled to the presumption of exposure to agent orange. This is not in dispute. What is in dispute under the VA regulations, is, did Petitioner actually serve in the Republic of Vietnam? This is clearly set forth in the VA decision dated May 8, 2002.

> Until such time as we hear otherwise, the General Counsel September 1996 opinion to the effect service in Vietnam actually means having set foot on shore is still for application and service connection for diabetes and its manifestations must therefore be denied. Since herbicide exposure is not automatically presumed for veterans who served off shore, the veteran needs to furnish evidence he was actually exposed to Agent Orange in service.

[VA File No. 24 699 165], attached to Motion to Show Cause at App. 39. See Pet., pp. 11-13 for full text of Opinion.

ARGUMENT

The VA states, "[28 U.S.C.] Section 1654 provides that, '[i]n all courts of the United States the parties may plead and conduct their own cases personally or by counsel.' But Section 1654 conditions that general authorization on 'the rules of such courts' governing the

'manage[ment] and conduct [of] causes therein. [Brief in Opposition, p. 5]

The VA misconstrues the meaning of the statute. The latter portion of the statute refers to the courts regulation of admission of attorneys to practice before the courts. It does not authorize the courts to restrict by rule *pro se* representation. "This authority includes the regulation of admissions to its own bar." Frazier v. Heebe, 482 U.S. 641, 645, 107 S.Ct. 2607, 2611 (1987)

Also, the argument of the VA relating to Rules 23 and 24 [Brief in Opposition, pp. 5-6] premised on this misconstrued meaning of Section 1654 must fail.

The VA suggests that Rule 23(c)(2) overrules 28 U.S.C. 1654. [Brief in Opposition, p. 6, n. 2] It is Hornbook law that statutes prevail over rules of court which may be in conflict.

The VA argues that Petitioner was represented by class counsel and any motions must be made through class counsel. [Brief in Opposition, pp. 7-8] Petitioner did request class counsel to represent him.

> Plaintiff attempted to obtain representation by the attorneys that represented the plaintiffs in the original action [Nehmer v. United States Veterans' Administration, 118 F.R.D. 113 (1987) and Nehmer v. United States Veterans' Administration, 712 F.Supp. 1404 (1989)]. Linda S. Peterson was not willing to represent new members of the plaintiff class and plaintiff was unable to locate Barton F. Stichman.

[Motion to Show Cause [Contempt], p. 1, Footnote 1]

Petitioner was represented by class counsel during the adjudication phase of the case, but Petitioner was abandoned by class counsel during the enforcement phase.

The VA argues: "[T]he proper course was for petitioner to seek leave to intervene in the action to present his individualized grievance." [Brief in Opposition, p. 8] Intervention was not appropriate because the judgment in the case had been final for several years. Intervention is defined: "The act by which a third party demands to be received as a party in a suit pending between other persons." [Black's Law Dictionary, 4th Ed., 1951, p. 956] This case was not "pending." A final decision was entered by Stipulation and Order several years ago. Petitioner's interests were adequately represented by the named plaintiffs. Petitioner's Motion was for enforcement, not adjudication.

The VA cites the recent case of Devlin v. Scardelletti, 536 U.S. 1, 122 S.Ct. 2005 (2002), which relates to a nonnamed class member appealing the settlement where he had objected at the fairness hearing. [Brief in Opposition, pp. 9-10] In this case no fairness hearing was conducted by the trial court. However, this court held in Devlin:

> We hold that nonnamed class members like petitioner who have objected in a timely manner to approval of the settlement at the fairness hearing have the power to bring an appeal without first intervening.

536 U.S. at 14, 122 S.Ct. at 2013.

Herein, there was no fairness hearing, but Petitioner did object by filing his contempt motion. Petitioner should, likewise, have the power to appeal without first intervening.

The VA argues that Petitioner must first exhaust all administrative remedies. [Brief in Opposition, p. 13] The law does not require Petitioner to do that which is futile. The VA medical records of Petitioner will confirm that Petitioner will probably not survive this lengthy administrative review process; Petitioner's kidneys functioning at only 30 percent due to Agent Orange poisoning.

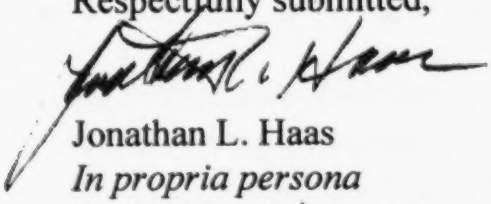
CONCLUSION

Petitioner has a Sixth Amendment constitutional due process right to his day in court. He has a statutory right to represent himself under 28 U.S.C. § 1654. The Appeals' Court has jurisdiction to enforce such statutory right.

Other Naval veterans of the Vietnam War, similarly situated, having served aboard Naval ships in the coastal waters of Vietnam, will likewise be denied their medical and financial benefits authorized by Congress, unless these issues are addressed by the Court.

The petition for a writ of certiorari should be granted.

Respectfully submitted,



Jonathan L. Haas
In propria persona
2534 North 19th Avenue
Phoenix, Arizona 85009
(602) 258-1018

December 3, 2003.

AFFIDAVIT OF JONATHAN HAAS, COMMANDER, USNR, RETIRED

STATE OF ARIZONA)
) ss.
County of Maricopa)

JONATHAN L. HAAS, upon his oath, deposes and says:

1. That he served on active duty in the United States Navy onboard the USS Mount Katmai (AE-16) in the coastal waters of the Republic of Vietnam during four campaigns of the Vietnam War.

2. That while in the coastal waters of the Republic of Vietnam rearming and resupplying United States Army, Navy and Coast Guard vessels, United States aircraft were performing aerial application of defoliates on the costal jungles.

3. That large clouds of defoliates formed over the tops of the trees and were blown out to sea enveloping Commander Haas' ship.

4. The ship was operating about 100 feet off the coast.

5. That the chemicals permeated the air, contacting Commander Haas' skin, and were breathed into the lungs of Commander Haas.

6. That the chemicals were identified to Commander Haas by United States Army personnel embarked on the ship as the defoliant "Agent Orange."

7. That while serving onboard the USS Mount Katmai he was hospitalized at the United States Naval Hospital, Subic Bay, P.I., and diagnosed as having gout.

/s/ Jonathan L. Haas
JONATHAN L. HAAS
Commander, USNR, Ret.

Signed and sworn to before me this 19th day of August, 2002, by Jonathan L. Haas.

(Seal) /s/ Kimberly Rose Rodriquez
Notary Public

KIMBERLY ROSE RODRIQUEZ
NOTARY PUBLIC, STATE OF ARIZONA
COMMISSION # 81659
MARICOPA COUNTY
COMMISSION EXPIRES FEB. 24, 2003